IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FIBER SYSTEMS INTERNATIONAL, INC., Plaintiff,	§	
v.	§	Civil Action No. 4:04CV355
DANIEL ROEHRS, ET AL., Defendants.	§	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR EMERGENCY INJUNCTIVE RELIEF AND BRIEF IN SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants, Daniel Roehrs ("Roehrs"), Michael Flower ("Flower"), Thomas Hazelton ("Hazelton"), Rick Hobbs ("Hobbs"), Kieran McGrath ("McGrath"), Applied Optical Systems, Inc., ("AOS") Opteconn, G.P., Inc. and Opteconn, L.P. d/b/a Optical Cabling Systems, (collectively "Defendants"), file this their Response in Opposition to Plaintiff's Application for Emergency Injunctive Relief and Brief in Support, and show the Court as follows:

INTRODUCTION AND SUMMARY

1. Plaintiff's Application should be denied. This suit is nothing other than a blatant attempt at forum shopping. The same relief which Plaintiff is seeking in this case has already been presented (with many of the same similarly or identically-worded affidavits) in a suit pending in Judge Caton's court in Collin County state court, styled *Fiber Systems International, Inc., et al. vs. Daniel Roehrs, et al.*, Cause No. 296-03833-03, in the 296th District Court, Collin County, Texas. In that case Plaintiff requested a similar "emergency" temporary restraining order. At a hearing on September 23, 2004, Judge Caton declined to grant a TRO to Plaintiff.

Instead, a temporary injunction hearing is set on October 26, 2004 in Judge Caton's court, and the parties have been in the midst of conducting discovery connected with that hearing for the last few weeks. Upset with the fact that Judge Caton did not grant them a temporary restraining order, on September 29, 2004 Plaintiff filed an *ex parte* request for TRO in the 199th district court of Collin County, Judge Dry presiding, apparently falsely stating to Judge Dry that the suits were unrelated.[1] Judge Dry initially entered an ex parte temporary restraining order which essentially shut down AOS and kept its employees from going to work. The next day, after the undersigned learned of the new suit and brought to Judge Dry's attention the relationship between it and the suit in Judge Caton's court, the TRO was dissolved and that case was transferred to Judge Caton for consolidation with her existing case.[2] The instant case is Plaintiff's third attempt at forum shopping, in which they ask this Court to render a temporary restraining order against Defendants based upon the same facts and affidavits previously presented in the Collin County cases. Defendants do not believe that Plaintiff adequately disclosed this history to this Court in its Application (see para. 2 of the Application), and Defendants respectfully urge the Court not to reward this behavior.

2. Injunctive relief should also be denied because there is no "emergency," and therefore there is no "substantial threat" of "irreparable harm." This "emergency" application is based upon facts which occurred last year, which Plaintiff sued about in state court last year, and which Plaintiff raised in an unsuccessful TRO request before Judge Caton last month based upon affidavits originally executed (for the most part) last summer. There is no basis for a TRO or any other "emergency" relief.

---

[1] The undersigned counsel were not notified that this ex parte hearing was going on, even though they were with Plaintiff's counsel at the Collin County courthouse that day.

[2] *See* Defendants' Appendix at Exhibits 3, 4, 5 and 6.

3. Injunctive relief should also be denied because Plaintiff has not shown "a substantial likelihood of success on the merits." To the contrary, Plaintiff's case is both legally meritless and factually frivolous.

4. Injunctive relief should also be denied in this case because the Application is based upon a false declaration by Michael Roehrs. In addition, in connection with attempting to obtain the same relief in the Collin County courts, Michael Roehrs submitted two other false sworn affidavits. These actions at a minimum constitute unclean hands which would preclude injunctive relief. The Court may also determine that they are a more serious matter.

5. Finally, the Application improperly seeks injunctive relief against entities who are not parties to this suit.

6. In sum, this suit is Plaintiff's third attempt at forum shopping. Plaintiff is falsely claiming there is some "emergency" about old meritless claims, which are already pending in another forum and are supported by false affidavits. The Court should deny the Application.

EVIDENCE

7. Filed simultaneously with this Opposition is an Appendix containing the evidence which is referred to herein.

FACTUAL BACKGROUND

8. The five individual Defendants were officers and directors of Plaintiff Fiber Systems International until early December, 2003. There was prior litigation involving the control of the company, which resulted in a mediated settlement. The result of the settlement was a stock purchase agreement under which the individual Defendants agreed to sell their stock in FSI to Michael Roehrs and others affiliated with him. The transaction closed in December, 2003.

9. On the heels of the closing of this transaction, Michael Roehrs initiated a lawsuit by FSI in December, 2003, in the 296th District Court of Collin County, Texas, alleging that the individual Defendants had stolen trade secrets and seeking damages and injunctive relief.

10. In connection with the stock purchase agreement, the individual Defendants entered into two restrictive covenants. First, they entered into a 3-month non-compete, which expired in March, 2004.[3] Second, they entered into an agreement not to solicit the employees of FSI for employment at a competitive venture for a term of six months.[4] That agreement expired in June, 2004. Defendants complied with the terms of these agreements.

11. After the expiration of the non-compete and the non-solicit agreements, three of the Defendants, Hazelton, Daniel Roehrs, and Michael Flower, formed Defendant Applied Optical Systems, Inc., which, at least in some lines, may enter into competition with Plaintiff, as it is expressly allowed to do once the non-compete has expired. AOS has not yet produced any product or made any sales.

12. Individual Defendants McGrath and Hobbs are affiliated with the Opteconn defendants. Opteconn is simply an assembler of components which are bought from others; it does not make any products or compete with Plaintiff.

13. Plaintiff admits that it does not know what the business of Opteconn is and does not consider it to be a direct competitor.[5]

14. Plaintiff did not seek any hearing on any request for emergency or injunctive relief between the filing of its state court suit in December, 2003 and late September, 2004.

[3] M. Roehrs depo. at 50 (Exhibit 7 to Defendants' Appendix).
[4] *Id.* at 53.
[5] *Id.* at 77.

15. On the afternoon of September 22, 2004, while the undersigned counsel for Defendants was in a deposition, he was hand-delivered in the mid-afternoon a thick packet of affidavits and a request for a temporary restraining order, along with notice that the hearing was set for 9:00 a.m. the next morning in Collin County. As the Court can see, the Collin County motion included most of the same affidavits that have been filed in this case — many in verbatim form.[6] It appears that Plaintiff's counsel has had these affiants re-execute those documents on October 12 and 14, 2004, most likely to create a false impression of urgency.

16. As the Court can see from the attachments which were filed in the Collin County court, many of the affidavits filed on September 22 in support of "emergency" relief were actually executed months earlier, and all are based upon a factual situation which the Plaintiff contends that it knew about last year. Despite the fact that Plaintiff is required to produce those affidavits in discovery as "witness statements" under Texas disclosure rules, Plaintiff did not produce any of those affidavits to counsel for Defendants prior to serving the injunction papers a few hours prior to the injunction hearing.

17. On September 23, 2004, the parties had a hearing before Judge Caton in the 296th District Court. After meeting with the parties and hearing extensive argument, Judge Caton ultimately declined to issue any type of temporary restraining order. Instead, she set the matter for a temporary injunction hearing a month hence. That hearing is currently set for October 26, 2004.

18. For the last few weeks, the parties have been doing discovery in anticipation of the temporary injunction hearing on this issue which is set before Judge Caton on October 26, 2004. The parties have taken over 15 depositions.

---

[6] Defendants' Appendix at Exhibit 2.

19. On September 29, 2004, the parties had a hearing which lasted for several hours, with breaks, in front of Judge Caton on discovery matters in the state court case. The next day, the undersigned counsel received notification that several AOS employees had been served with a temporary restraining order from the 199th District Court which prevented them from coming to work. The undersigned counsel learned that the TRO was obtained by Plaintiff's counsel on an *ex parte* basis while the undersigned counsel was still in the Collin County courthouse. What had apparently happened is that Plaintiff's local counsel, while motions were being argued in front of Judge Caton and without notification to the undersigned or the judge, had filed another lawsuit against the employees of AOS, had falsely represented to Judge Dry that it was an unrelated case, and had obtained *ex parte* temporary injunctive relief. The temporary restraining order essentially shut down AOS since it did not allow the employees to come to work.

20. On October 1, 2004, the undersigned arranged a hearing in front of Judge Dry, who heard full argument from the parties about the ex parte TRO. At the conclusion of the hearing, Judge Dry signed an order vacating the TRO and transferring the case to Judge Caton for consolidation with her pending case.

21. The depositions that are attached to Plaintiff's Application were taken in discovery for the hearing on Plaintiff's temporary injunction that is set before Judge Caton on October 26, 2004. Plaintiff's Chairman Michael Roehrs, who filed a declaration in this action and two affidavits in the other two Collin County cases, was deposed on October 8, 2004. His deposition makes clear that both of the affidavits he filed in state court and his declaration in this case contain false statements.

22. The depositions have shown that none of the Defendants have any trade secrets or any other property of Plaintiff, nor does Plaintiff have any evidence that they do. The claims are

therefore frivolous. The claim appears to be brought in an attempt to unlawfully extend a non-complete agreement which has long ago expired. Such is not allowable under Texas law. *Rimes v. Club Corp,* 542 S.W.2d 909, 912 (Tex. App.—Dallas, 1976, writ ref'd n.r.e.)(term of covenant not to compete cannot be extended after its expiration by injunction).

23. The Plaintiff's Application for Emergency Injunctive Relief in this suit was filed on October 15, 2004, on a day that Plaintiff's counsel, Brian Colao, knew that Defendants' lead counsel, Craig Haynes, would be unavailable because he was responsible for putting on the Dallas Bench Bar Conference in Conroe, Texas, on October 14-16, 2004. Colao unsuccessfully attempted to schedule a hearing that morning with the Court knowing that Mr. Haynes would be unable to be heard at that time.

24. The parties are continuing to take discovery in the state court case for the trade secret temporary injunction hearing set for October 26, 2004.

ARGUMENTS AND AUTHORITIES

25. **Forum Shopping and Lack of any "Emergency."** This case is a transparent attempt to forum shop and it involves no "emergency." Judge Caton has already declined to grant the same "emergency" temporary restraining order that is sought here, and she has set a temporary injunction hearing for October 26. Plaintiff has already made one other attempt at forum shopping by filing an *ex parte* suit in front of Judge Dry after failing to obtain a TRO from Judge Caton. Neither Judge Caton nor Defendants' counsel were notified of that *ex parte* hearing, and Judge Dry was apparently falsely told that the suit was unrelated to the suit in Judge Caton's court. This resulted in an order which essentially shut AOS down for one day, but when the misrepresentations made to Judge Dry were brought to light, he vacated the order and transferred his case to Judge Caton. Now, incredibly, the Plaintiff persists in forum shopping by

filing this suit in federal court and seeking "emergency" relief based upon facts that are alleged to have occurred last year, and are the subject of a Collin County suit in which Plaintiff did not seek injunctive relief for more than nine months. The TRO that Plaintiff seeks in this suit has already essentially been denied twice. In support of its request Plaintiff recycles the affidavits (most signed last summer) which were presented to Judge Caton, but has them re-executed on October 12 and 14 to create a false impression of urgency. This Court should not grant equitable relief under these circumstances.

26. **No Substantial Likelihood of Success.** The Court should also deny equitable relief because there is neither a legal nor a factual ground for the relief sought for the only claim pled, much less is there the required proof by Plaintiff of a "substantial likelihood of success" on the merits.

27. **(A) No Legal Claim.** The only claim pled is under 18 U.S.C. § 1030 (the "CFAA"). For the reasons set forth in Defendants' Motion to Dismiss under FRCP 12(b)(6) filed simultaneously with this Response, Plaintiff has not pled a claim under the CFAA, because it has not set forth facts showing the essential elements of: (1) lack of authorization to access the computer; and (2) damage in excess of $ 5,000.00 to a protected computer. In fact, the evidence from Plaintiff's own affiants negates those elements. Plaintiff's Application claims to have submitted evidence that Defendants did not have authorization to access the computers by citing to paragraphs 3 and 4 of the attached Reid Affidavit and paragraph 4 of the Suter Affidavit. Plaintiff's Application for Injunctive Relief at p. 21. However, neither of those paragraphs say any such thing. In fact, the sworn testimony of Michael Suter is that the management of the company "had access to everything" and that, as IT director for FSI, Suter "let everybody have access to what they wanted on the executive level." Suter depo. at p. 50 (attached as exhibit 8 to

Defendants' Appendix in Opposition to Plaintiff's Application for Emergency Injunctive Relief). Since the second sentence of Plaintiff's Complaint alleges that the individual Defendants were "officers and directors" of FSI at the time that the computer access in question occurred, there would be no lack of authorization. Furthermore, Suter and Plaintiff's affiant Reid both testified that the computer systems are backed up daily and another copy of the system was kept on tape off-site. Thus, even if Defendants had deleted any information from any protected computer, there would be no harm. Suter depo at pp. 9-12; 68-69; Reid depo at pp. 48-50 (attached as exhibits 8 and 9 to Defendants' Appendix). Reid directly testified that he knew of no business disruption that resulted from any deleted files because they were immediately replaced by back-ups. Reid depo at p. 50. The Plaintiff cannot show a likely recovery on the merits under that statute, because it does not even have a legal claim pled under that statute.

28. **(B) No Factual Claim.** Furthermore, Plaintiff does not have a factually meritorious claim. As shown by Michael Roehrs' own deposition testimony, the evidence shows that there is absolutely no evidence that the Defendants have a single trade secret or any other property of FSI in their possession. All of the property that the affiants allege was "removed" from the premises last year has either been returned or explained long ago. With respect to the specifics of the allegations, Defendants would show the following:

(i). There is no evidence that any of the Defendants have any trade secrets of Plaintiff. To the contrary, the evidence of the deposition testimony which is attached to Plaintiff's application (D. Roehrs, M. Flower, T. Hazelton) all affirmatively says that the Defendants do not have any property of FSI nor any trade secret information in their possession. The deposition testimony of Plaintiff's Chairman Michael Roehrs (attached as exhibit 7 to

Defendants' Appendix) shows that he and FSI, contrary to the conclusory statements in his declaration, have no contrary information;

(ii). Defendants McGrath, Hobbs, Opteconn, G.P., Inc., and Opteconn, L.P. d/b/a Optical Cabling Systems, not only have no FSI information or trade secrets in their possession, but they are not even competitive ventures with FSI;

(iii) None of the individuals nor any of the corporate defendants have actually made any competitive product as of the time of the filing of this action;

(iv) The declaration of Michael Roehrs which was filed with this Court as Exhibit A to the Plaintiff's Application for Emergency Injunctive Relief is false.

29. With respect to each of the Defendants, the deposition testimony of Michael Roehrs and the exhibits attached to Plaintiff's Application for Injunctive Relief show the following:

a. Thomas Hazelton – Thomas Hazelton is accused of taking company information in November and December 2003 by loading it onto DVDs. In fact, the testimony shows that Mr. Hazelton was merely attempting to copy the contents of his personal drive, but in any event, the attempt to copy failed and nothing was copied. He threw the DVDs away last year because they had no information on them. When he left the company there would have been some company information on his laptop, which Mr. Hazelton erased last year. Plaintiff's representative Michael Roehrs admits that he has no knowledge that Mr. Hazelton has any other property, or that he has any property today of the company.[7]

b. Daniel Roehrs – The claim against Daniel Roehrs is that he copied the company's information on a portable hard drive in 2003. However, it is undisputed that in either

---

[7] M. Roehrs deposition at 14, 17-18, 20-22 (Exhibit. 7 to Defendant's Appendix).

December or January, Mr. Roehrs had erased the data from that hard drive and had returned the hard drive to the company. The reason that the hard drive was copied was because the IT director, Michael Suter, was on suspension at the time for company violations, and it is company policy to keep an offsite backup of the company data, as even Mr. Suter admitted. In any event, there is no evidence that Mr. Roehrs has any of that data today.[8]

c. Michael Flower – The evidence from the depositions is that Michael Flower did not take any property from FSI when he left, as even Michael Roehrs admits.[9]

d. Applied Optical Systems, Inc. – Applied Optical Systems, Inc. did not even exist in 2003, and none of the affidavits state that it has taken any data from the company. The principals of Applied Optical Systems, Inc. are Daniel Roehrs, Michael Flower and Thomas Hazelton.

e. Rick Hobbs – There is no information that Mr. Hobbs took any information from the company. The only allegation is in the affidavit of Mr. Reid that he had a 40 megabyte hard drive with information on it. However, Mr. Reid has admitted that this 40 megabyte hard drive never left the company and was never in Mr. Hobbs' possession. There is no other proof against Rick Hobbs.[10]

f. Keiran McGrath – There is no specific allegation as to Mr. McGrath taking any company property, nor does Michael Roehrs have any knowledge that he took any.

g. Contrary to the declaration, Michael Roehrs' sworn testimony on October 8, 2004, was that he has no knowledge of what the business of Opteconn, G.P., Inc. or Opteconn, L.P. d/b/a Optical Cabling Systems is, although he believes that they are simply an assembly shop and that they are not competitors.[11] That company did not exist in 2003, and therefore could not have downloaded any information.

---

[8] M. Roehrs depo. at 33-36, 155-160, 163; Suter depo at 68-69.
[9] M. Roehrs depo. at 38-39.
[10] M. Roehrs depo. at 26; W. Reid depo. at 54-56 (Exhibit 9 to Defendant's Appendix).

h. Furthermore, the allegations in the Woodruff declaration that disclosures at a DSCC meeting show that Defendants have trade secrets is untrue. Woodruff's declaration is riddled with pure speculation, which turns out to be incorrect, as detailed by the declaration of Michael Flower (exhibit 16 to Defendants' Appendix).

i. In short, the evidence from both parties shows that Defendants do not have any trade secrets or any other property of Plaintiff, and Plaintiff has no evidence that they do. The fact is that the AOS Defendants simply are in the process of developing their own product, independently of any information from FSI. The OCS defendants are not even in the same line of work as FSI.

30. **False Declaration and Affidavits**. The declaration of Michael Roehrs submitted as exhibit A in support of Plaintiff's Application, as well as his two affidavits in the state courts, contain several false sworn statements. The following are only a few examples:

- In paragraph 12 of his declaration Roehrs swears that, "The TFOCA, TFOCA-II [and other products] simply cannot be manufactured without the use of FSI's drawings and design specifications." However, in his deposition Roehrs testified that "anyone can design a TFOCA-II today" (M. Roehrs dep. at 260, see also 204-205); and that other companies which do not have FSI's drawings make these products (M. Roehrs dep. at 59-61, 63-65, 71-72, 198, 270). Incidentally he also testified that many of the specs are public (M. Roehrs dep. at 256-60, 281-82).

- In paragraph 13 of his declaration Roehrs sets forth a series of internally contradictory statements in which he first swears that FSI's drawings and specifications are not disclosed outside the walls of FSI or even to the military, but then he admits they are disclosed to customers and vendors. If one compares this version of the affidavit with the same portion of his affidavit submitted to Judge Caton (para. 10 of exhibit A to Exhibit 2 to Defendants' Appendix) one will see that the paragraphs contradict each other, as well as his deposition testimony on the subject (M. Roehrs dep. at 221-226).

[11] M. Roehrs depo. at 77.

- In paragraph 19 of his declaration Roehrs swears that he believes that OCS is "improperly competing against FSI by attempting to create and sell their own TFOCA II connectors." However, Roehrs testified in his deposition that he has no knowledge of what OCS does, he "doubts" they make a TFOCA II connector, and believes them to be in "the cable assembly business" and not a direct competitor of FSI. (M. Roehrs dep. at 77).

- In paragraph 20 of his declaration Roehrs swears that each of the five named individual defendants "failed to return" a long list of property "including FSI drawings and design specifications." However, when questioned in detail about each individual defendant, Roehrs admitted that he does not have any personal knowledge that any of them have any FSI property. (M. Roehrs dep. at 14, 17-18, 20-21, 26, 33-36, 38-39, 155-160, 163). In direct contradiction to his sworn declaration, Roehrs testified on October 8, 2004, that he has no knowledge that Michael Flower took any drawings or any other FSI property when he left, and that Flower instead "left everything there." (M. Roehrs dep. at 38-39).

- In connection with his sworn affidavits, Michael Roehrs testified that he considers "hearsay" to be "personal knowledge." (M. Roehrs dep. at 125).

- In his affidavit in the 199th District Court, Roehrs swore that he had both information and belief the five AOS defendants in that suit "wrongfully removed certain property of FSI from FSI's premises. These items include customer lists, engineering and product designs, and other confidential and proprietary documents and files containing trade secrets." (exhibit 3 to Defendants' Appendix at p. 8 (para. 25) and at exhibit C). In his deposition, Roehrs admitted that these sworn statements were lies. (M. Roehrs dep. at 22-23). This false affidavit was used to obtain the *ex parte* TRO from Judge Dry discussed above.

- In his affidavit in the 199th District Court, Roehrs swore that the named defendants, including Melissa Jantz, received "specialized training in the unique field of heavy-duty military grade fiber-optic connector design and manufacture process." (exhibit 3 to Defendants' Appendix at p. 3 (para. 13)). In his deposition, Roehrs admitted that he had no such knowledge when he swore to that statement. (M. Roehrs dep. at 139-140).

- In both his affidavit in Judge Caton's court and in paragraph 17 of his declaration in this Court, Roehrs swears that AOS "is actively using FSI's confidential information and proprietary information to improperly compete against FSI…" However, on October 8, 2004, Roehrs testified that he has no knowledge of what products AOS has or will develop. (M. Roehrs dep. at 214).

These false statements alone should be sufficient to deny Plaintiff equitable relief.

31. **Relief Sought Against Non-Parties.** The relief which Plaintiff seeks is an order enjoining the Defense Supply Center in Columbus, Ohio and all members of the Defense Supply Center's two working groups to engage in certain actions. None of those parties are joined in this case, and therefore there is no basis for the Court to enter any injunction against them. Undoubtedly, the reason that those parties are not joined in this case is because the true goal of this case has nothing to do with trade secrets. Rather, it is all about forum shopping for a more favorable venue for the Plaintiff's claims against Defendants.

CONCLUSION

32. The Application should be denied. First, it is forum shopping of a matter which is already in front of Judge Caton. Second, there is no emergency because these are old claims. Third, the Plaintiff has unclean hands because it has submitted false testimony. Fourth, the Plaintiff has unclean hands because it has not made sufficient disclosure to the Court of the existing suit in Judge Caton's court and the fact that this same request has been denied. Fifth, the Complaint pleads neither a legal nor factual claim under the CFAA, so there is no basis to grant injunctive relief. Sixth, even if there were a legal cause of action pled under the CFAA, the evidence does not establish with factual specificity in any believable form an actual violation of the CFAA. Rather, the statements that there was damage in excess of $5,000 and that "access was unauthorized" are nothing but conclusory statements in Michael Roehrs' declaration, which otherwise contains false statements.

33. Plaintiff's actions in repeated and blatant forum shopping, and its repeated requests for "emergency" relief based upon false affidavits and tactically invented emergencies, is not something that should be rewarded. Plaintiff's Application for injunctive relief should be denied.

Respectfully submitted,

THOMPSON & KNIGHT LLP

By: ______________________
Craig A. Haynes
State Bar No. 09284020

William M. Katz, Jr.
State Bar No. 00791003

1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201
(214) 969-1700
Fax: (214) 969-1751

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on Plaintiffs, by and through their attorney of record, Brian A. Colao, LOCKE LIDDELL & SAPP, LLP, 2200 Ross Avenue, Suite 2200, Dallas, Texas 75201, by hand delivery this 20 day of October, 2004.

____
Craig A. Haynes